(17,495.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 381.

E. M. PATTON, PLAINTIFF IN ERROR,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from the circuit court of the United States for the western district of Texas	1	1
Caption	1	1
Transcript from State court	2	1
Caption	2	1
Original petition	2	2
Summons and return	4	3
Petition for removal	5	5
Bond for removal	7	7
Order of removal	9	8
Bill of costs	9	8
Clerk's certificate	10	9
First amended original petition	11	9
Second amended original answer	13	11
Judgment	17	14
Motion for new trial	17	15
Order overruling motion for new trial	18	15

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 26, 1899.

	Original.	Print.
Plaintiff's bill of exceptions	18	16
Statement of evidence	18	16
Judge's certificate to bill of exceptions	30	26
Assignment of errors	31	26
Writ of error	32	27
Bond on writ of error	33	28
Citation	34	29
Clerk's certificate	35	30
Argument and submission	36	30
Judgment	36	30
Assignment of errors	37	31
Petition for writ of error	38	32
Allowance of writ of error	39	32
Bond on writ of error	40	33
Opinion	42	34
Clerk's certificate	53	42
Writ of error	54	42
Citation and service	55	43

a UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1898, and held in the court-room of said court, in the city of New Orleans, before the Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit; the Honorable Aleck Boarman, United States district judge for the western district of Louisiana, and the Honorable Charles Parlange, United States district judge for the eastern district of Louisiana.

E. M. PATTON, Plaintiff in Error,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY, Defendant in Error. } No. 724.

Be it remembered that heretofore, to wit, on the 2nd day of May, 1898, a transcript of the record of the above-styled cause from the circuit court of the United States for the western district of Texas was filed in the office of the clerk of said United States circuit court of appeals in the words and figures following, to wit:

1 *Caption.*

Be it remembered, that there was opened and begun to be holden a regular term of the United States circuit court of fifth circuit and western district of Texas, at El Paso, Texas, on the fourth day of April, A. D. 1898, it being the first Monday in said month and the day fixed by law for commencing a regular term of said court at said place—present, the Honorable Thomas S. Maxey, United States district judge; Honorable Robert U. Culberson, United States district attorney; George L. Siebrecht, United States marshal for said district, and D. H. Hart, clerk of said court—when and where the following proceedings, among others, were had, to wit:

E. M. PATTON, Plaintiff,
versus
TEXAS & PACIFIC RAILWAY COMPANY, Defendant. } No. 173.

2 *Transcript from the District Court of El Paso County, Texas.*

Filed May 1st, A. D. 1893.

Caption.

Be it remembered, that on this the 3rd day of April, A. D. 1893, the same being the fourth Monday after first Monday in March, A. D. 1893, was begun and holden the hon. the district court of El Paso county, Texas, holding sessions in and for the April term, A. D. 1893, thereof.

Court met at 9 o'clock a. m.

Present and presiding: The Hon. C. N. Buckler, judge of said court. Other officers present: Hon. O. A. Larrazolo, district attorney; F. B. Simmons, sheriff, and J. A. Escajeda, clerk.

Plaintiff's Original Petition.

Filed March 17, A. D. 1893.

In District Court, El Paso County, Texas.

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 1766.

To the honorable district court, El Paso county, Texas:

E. M. Patton, plaintiff, complaining of The Texas & Pacific Railway Company, defendant, respectfully states: That plaintiff is a resident of El Paso county, Texas, and the defendant is a corporation duly incorporated, doing business in El Paso county, Texas, and is now, and for several years has been engaged in the business of a common carrier, in said county, operating its line of railway therein, and now has as its local agent, representing it in said county, E. Thornton, Jr., who is a resident of said county.

That heretofore, to wit: on the first day of December, 1892, plaintiff was in the employ of defendant as fireman on one of its locomotive engines; that at about 11.40 a. m., on said da he came in on regular run, and at about 2 o'clock p. m. on said day, after dinner, he started back to do the work of filling up oil cans, lubricators, and wiping off and cleaning locomotive engine No. 90, on which he was employed, which said work it was his duty to perform:
3 that he found said engine standing at a coal car in said company's car yard in the city of El Paso, Texas, coaling up; that he got on said engine to do the work of cleaning up, &c.: that shortly afterward said engine left the coal car and was run down toward the sand-house in said car yard; that when said engine was so run down toward said sand-house, he had finished the work mentioned excepting the filling up of oil cans; that he remained on the engine and rode down to said sand-house about 300 yards; that he had a right to be on said engine at said time; that said engine was stopping gradually near said sand-house to have fire cleaned out; that as said engine was stopping, and while it was moving very slowly, plaintiff attempted to step off of said engine so as to get out of the way of the fire-cleaner, who was about to enter upon said engine to clean out the fire; that the step leading from said engine and from the cab thereof was in a bad, defective, and improper condition, and was loose so that as plaintiff attempted to step from said engine, said step being in such bad condition turned so that it threw plaintiff under said engine and caused plaintiff to fall, so that his right leg was thrown under said engine and said engine ran over his right leg and it was braised and lacerated, and his right foot

was mashed and it became necessary to amputate his right leg at once, about three inches above the ankle-joint; that in consequence of said injury his right leg was amputated at once, about 3 inches above the ankle-joint and he remained confined to his room about 2 months, and suffered great physical pain and mental anguish, and disquietude and still suffers great physical pain, and mental disquietude.

Plaintiff says that he was in no degree negligent in stepping from said engine while it was moving slowly as hereinbefore stated, and that had said step leading from said engine and cab been in a good, proper and safe condition, he could and would have sustained no injury whatever; that it was the duty of the defendant at the time of said injury to have had and kept said step in a good, safe and proper condition, and that in consequence of the negligence and carelessness of defendant in not keeping said step, and in not having same at said time in a good, safe and proper condition, but in having it and allowing it to be, at said time in a bad, defective and loose condition, he sustained the injuries hereinbefore mentioned. That at said time defendant knew or ought to have known, and could have known by the exercise of reasonable diligence that said step was in such bad, loose and defective condition, and plaintiff did not know and was not chargeable with notice that said step was in such condition.

Plaintiff states that at the time of said accident he was between
33 and 34 years of age; that prior to said accident he was
4 a strong, able-bodied and vigorous man, and his services were reasonably worth, and he could have made $85.00 per month, but in consequence of such injuries he is now a cripple for life, and has been damaged by such injuries in the sum of $20,000.00.

Plaintiff prays that defendant be cited to answer this petition, and he prays that upon final hearing he have judgment for his damages and costs.

MILLARD PATTERSON,
Att'y for Pl'ff.

Indorsed: No. 1766. In dist. ct., El Paso county, Texas. E. M. Patton *vs.* The Texas & Pacific R'y Co. Plaintiff's original petition. Filed this 17th day of March, A. D. 1893. J. A. Escajeda, clerk district court, El Paso Co., Texas.

Citation.

Filed April 3rd, A. D. 1893.

THE STATE OF TEXAS:

To the sheriff or any constable of El Paso county, Greeting:

You are hereby commanded to summon the Texas & Pacific Railway Company, whose local agent in El Paso county is E. Thornton, Jr., to be and appear before the honorable district court of El Paso county, Texas, at the next regular term thereof, to be

holden at the court-house, in the city of El Paso, on the 3rd day of April, A. D. 1893, then and there to answer the plaintiff's petition filed in a suit in said court on the 17th day of March, A. D. 1893, wherein E. M. Patton is plaintiff and said Texas & Pacific Railway Company is defendant, file number of said suit being No. 1766. The nature of the plaintiff's demand is as follows, to wit:

To recover of defendant the sum of $20,000.00 as damages for loss of right leg, and pain and suffering experienced by plaintiff in consequence of bad, defective and loose condition of step of engine No. 90, on the 1st day of December, 1892.

And you will deliver to said defendant in person a true copy of this citation.

Herein fail not, and have you before said court this writ with your indorsement thereon, showing how you have executed the same.

Given under my hand and the seal of said court, at office in
5 El Paso, Texas, this the 17th day of March, A. D. 1893.

[SEAL.] Attest: J. A. ESCAJEDA,
Clerk District Court, El Paso County, Texas.

Sheriff's Return.

Came to hand the 17 day of Mar., A. D. 1893, at 10 o'clock a. m., and executed the 19 day of Mar., A. D. 1893, by delivering to E. Thornton, Jr., the within-named defendant in person, a true copy of this writ.

F. B. SIMMONS,
Sheriff, El Paso Co., Texas,
By T. A. BENDY, *Deputy.*

Fees.

Serving 1 copy $1.50
Mileage .....

Total .....$

Indorsed: File No. 1766. District court, El Paso county, Texas, April term, 1893. E. M. Patton *vs.* The Texas & Pacific Railway Company. Citation. Issued March 17th, 1893. J. A. Escajeda, district clerk. Filed the 3rd day of April, A. D. 1893. J. A. Escajeda, clerk, by M. L. Barlow, deputy.

Petition for Removal.

Filed April 1st, A. D. 1893.

In the District Court of El Paso County, Texas, 34th Judicial District.

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 1766.

Petition for removal.

The petition of the Texas & Pacific Railway Company, respectfully shows to the court:

First. That the Texas & Pacific Railway Company was, and is, a corporation, duly organized and existing under and by virtue of the laws of the United States, to wit: "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construc-
6 tion of its road, and for other purposes," approved March 3, 1871, and acts amendatory thereof and supplemental thereto, including an act approved May 2, 1872, whereby among other things, the name, style and title of said Texas and Pacific Railroad Company was changed to "the Texas and Pacific Railway Company."

Second. That the above-entitled action was commenced in the above-named court on the 17th day of March, 1893, and citation issuing therein was served upon this defendant on the 18th day of March, 1893, which said citation is returnable on the first Monday in April, 1893, it being the 3rd day of April, 1893, and this defendant is not and will not be required, by the laws of the State of Texas, or the rule of this court, to answer or plead to the petition of plaintiff before the 4th day of April, 1893.

Third. That the matter in dispute in this case exceeds exclusive of interest and cost the sum or value of two thousand dollars, and this suit arises under the laws of the United States as hereinbefore and hereinafter more fully set forth; that this action was brought by the plaintiff, against your petitioner, The Texas & Pacific Railway Company, to recover damages in the sum of twenty thousand dollars for injuries alleged to have been received while in the employe of said company in the capacity of fireman on account of defective step to an engine being operated by the said company, which injuries the plaintiff alleges caused him to lose his leg by the negligence of said company as appears from plaintiff's petition, which is referred to for more particular statement of the cause of action. That this suit against this defendant is a suit arising under the laws of the United States, and more especially under the laws of the United States, constituting the charter of this defendant, and under which it was incorporated, that is to say, the said act of Congress of the United States approved March 3, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in

the construction of its road and for other purposes," and acts amendatory on May 2, 1872, March 3, 1873, and June 22, 1874.

Fourth. That the above-entitled action is a civil suit arising under the laws of the United States of which the circuit court of the United States for the western district of Texas is given original jurisdiction by act of Congress approved March 3, 1887, to wit: An act entitled "An act to amend the act of Congress, approved March 3, 1875, entitled 'An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes,' and the acts of Congress approved August 13, 1888, entitled "An act to correct the enrollment of an act approved March 3, 1887, entitled 'An act to amend sec-
7 tions 1, 2, 3 and 10, of an act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from the State courts and for other purposes,' approved March 3rd, 1875."

Your petitioner herewith presents and files a good and sufficient bond conditioned that it will enter and file in the circuit court of the United States for the western district of Texas, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by said circuit court if said court shall hold that said suit is wrongfully or improperly removed thereto, and to enter special bail in said suit, if special bail was originally requisite therein. Your petitioner therefore prays the said court to accept said petition and bond, and to remove this cause to the circuit court of the United States for the western district of Texas, and for such other relief in the premises as may be just and equitable.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By EDWARDS & NEILL, *Attorneys.*

THE STATE OF TEXAS, }
County of El Paso. }

B. F. Darbyshire, being duly sworn, says that he is the agent of the Texas & Pacific Railway Company, being the general agent of said company; that the said The Texas & Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the United States; that he has read the foregoing petition and knows the contents thereof; that the facts therein stated are true.

B. F. DARBYSHIRE.

Sworn to and subscribed before me, this 1st day of April, 1893.
[SEAL.] J. C. LACKLAND,
Notary Public, El Paso County, Texas.

Indorsed: No. 1766. E. M. Patton *vs.* The Texas and Pacific Railway Co. Petition for removal. Filed the 1st day of April, A. D. 1893. J. A. Escajeda, clerk district court, El Paso county, Texas, by M. L. Barlow, deputy.

Bond for Removal.

Filed April 1st, A. D. 1893.

In the District Court of El Paso County, Texas, 34th Judicial District.

8 E. M. PATTON *vs.* TEXAS & PACIFIC RAILWAY COMPANY. } No. 1766.

Know all men by these presents that The Texas & Pacific Railway Company, as principal, and C. R. Morehead and J. C. Lackland as sureties, are held and firmly bound unto E. M. Patton in the penal sum of five hundred dollars, for the payment whereof, well and truly to be made, unto the said E. M. Patton, his heirs and assigns, we jointly and severally bind ourselves, our successors, representatives, heirs and assigns, firmly by these presents, yet upon these conditions, that,

Whereas, the said The Texas & Pacific Railway Company has filed its petition in the district court of El Paso county, for the removal of a certain cause therein pending, wherein E. M. Patton is plaintiff and The Texas & Pacific Railway Company is defendant, said cause being numbered upon the docket of said court as No. 1766, to the circuit court of the United States for the western district of Texas:

Now, therefore, if the said The Texas & Pacific Railway Company shall enter in said circuit court of the United States for the western district of Texas, a copy of the record in said suit on the first day of next session thereof, and shall pay all costs which may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall there appear and enter special bail in said suit, if the same was originally requisite in said cause, then this obligation shall be void; otherwise, of full force and effect.

Witness our hands and seal this 1 day of April, 1893.

THE TEXAS & PACIFIC RAILWAY COMPANY.
By EDWARDS & NEILL, *Att'ys.*
C. R. MOREHEAD.
J. C. LACKLAND.

Approved this 3rd day of April, 1893.

C. N. BUCKLER,
Judge District Court, 34th Judicial District.

Indorsed: No. 1766. E. M. Patton *vs.* The Texas and Pacific Railway Co. Bond for removal. Filed the 1st day of April, A. D. 1893. J. A. Escajeda, clerk district court, El Paso county, Texas, by M. L. Barlow, deputy.

9 *Order of Removal.*

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 1766.

This cause coming on this day to be heard, upon the petition of the Texas and Pacific Railway Company, to remove same to the circuit court of the United States for the western district of Texas, said petition being heard by the court, and it appearing to the court that a good and sufficient bond has been filed, and that said petition shows proper grounds for removal, the prayer of the said The Texas & Pacific Railway Company is granted and its bond approved, and this cause ordered removed to the circuit court of the United States for the western district of Texas. And the clerk of this court will make out a transcript of the record in this cause, to be filed in the United States court of the said district of Texas.

Bill of Costs.

THE STATE OF TEXAS:

E. M. PATTON, Plaintiff,
vs.
TEX. & PAC. R. R. Co., Defendant. } No. 1766.

Tex. & Pac. R. R. Co. and C. R. Morehead & J. C. Lackland to officers of court, Dr.

Clerk's Fees.

Issuing writ and copy	$1.50
Docketing cause	.20
Filing papers, 3	.45
Entering 1 order	.75
Approving bond	1.50
Taxing costs and cop. thereof	.25
Transcript to Federal court, 40 folios	8.00
Total clerk's costs	$12.65

10 *Sheriff's Fees.*

Executing writ and cop., 1		1.50
Total sheriff's fees	$1.50	
Total clerk's costs	12.65	
Total costs		$14.15

THE STATE OF TEXAS, }
County of El Paso. }

In District Court, El Paso County.

I, J. A. Escajeda, clerk of the district court in and for said county and State, hereby certify the above to be a correct account of the costs in above entitled and numbered suit up to this date.

Witness my hand and seal of said court affixed at office in the city of El Paso, Texas, this the 1st day of May, 1893.

J. A. ESCAJEDA,
Clerk District Court, El Paso Co., Texas,
By M. L. BARLOW, *Deputy.*

Indorsed: May 1st, 1893. Received of defendant fourteen and $\frac{15}{100}$ dollars. J. A. Escajeda, clerk.

THE STATE OF TEXAS, }
County of El Paso. }

I, J. A. Escajeda, clerk of the district court in and for El Paso county, State of Texas, do hereby certify that the foregoing thirteen pages contain a full, true and correct copy and transcript of all papers filed, and proceedings had in the district court of El Paso county, Texas, in the case of "E. M. Patton *vs.* The Texas & Pacific Railway Company," numbered 1766 on the docket of said court.

In testimony whereof, witness my hand and the seal of the district court at office in El Paso, Texas, this 1st day of May, A. D. 1893.

[SEAL.]

J. A. ESCAJEDA,
Clerk District Court, El Paso County, Texas,
By M. L. MARLOW, *Deputy.*

Indorsed: No. 173. Removed from El Paso county.
11 E. M. Patton *vs.* Tex. & Pac. R'y Co. Record from El Paso Co. dist. court. Filed May 1st, 1893. B. G. Duval, clerk, by W. A. Gibbs, deputy.

Plaintiff's First Amended Original Petition.

Filed April 6th, 1898.

In the United States Circuit Court, W. D. T., at El Paso, Texas.

E. M. PATTON }
vs.
THE TEXAS & PACIFIC RAILWAY CO. }

To the honorable U. S. circuit court:

Now comes E. M. Patton, plaintiff in the above-styled cause, and by leave of court first obtained, files this his first amended original petition, in lieu of his original petition heretofore filed and respectfully states:

That the plaintiff is a resident of El Paso county, Texas, and that the defendant, The Texas & Pacific Railway Company, is a corporation duly incorporated, doing business in El Paso county, Texas, and is now and for several years has been engaged in the business of a common carrier in said county operating its line of railway therein, and now has a local agent representing it in said county, and has heretofore filed an answer herein.

That heretofore, to wit: on the first day of December, 1892, the plaintiff was in the employ of defendant as a fireman on one of its locomotive engines; that at about 11.40 a. m. on said date he came in on a regular run, and about 2 o'clock p. m. on said day, after dinner, he started back to do the work of filling up oil cans, lubricators, and to wipe off and clean locomotive engine No. 90 on which he was employed, which said work it was his duty to perform.

That he found said engine standing at a coal car in said company's car yard, in the city of El Paso, Texas, coaling up; that he got on said engine to do the work of cleaning it, etc. That shortly afterward the engine left the coal car and was run down toward the sand-house in said car yard. That when said engine was run down toward said sand-house, he had finished the work mentioned except the filling up of oil cans. That he remained on said engine to ride down to said sand-house, about three hundred yards; that he had a right to be on said engine at said time. That said engine was
12 stopping gradually near said sand-house to have the fire cleaned out, and that as said engine was stopping, and while it was moving very slowly, plaintiff attempted to step off of said engine so as to get out of the way of the fire-cleaner, who was about to enter upon said engine and clean out the fire; that the step leading from said engine and from the cab thereof was in a bad, defective and unsafe condition and was loose, so that as plaintiff attempted to step from said engine, said step being in such a bad and unsafe condition, turned, so that it threw plaintiff under said engine, and caused plaintiff to fall, so that his right leg was thrown under said engine and said engine ran over his right leg and it was bruised and lacerated, and his right foot was mashed, and it became necessary to amputate his right leg at once about three inches above the ankle-joint, and he remained confined to his room about two months and suffered great physical pain, and mental anguish and disquietude, and still suffers great pain and mental disquietude.

Plaintiff says that he was in no degree negligent in stepping from said engine while it was moving slowly, as hereinbefore stated, and that had said step leading from said engine and cab been in a good, proper and safe condition, he could and would have sustained no injury whatever. That it was the duty of defendant at the time of said injury, to have had and kept said step in good, proper and safe condition, and that in consequence of the carelessness of said defendant in not keeping said step, and in not having the same at said time, in a good, safe and proper condition, and in having it and allowing it to be at said time in a bad, defective and loose condition, he sustained the injuries hereinbefore mentioned.

Plaintiff says further that said engine came in on its regular run

on said first day of December, 1892, from the town of Toyah on the line of defendant's railway, which place is about 196 miles easterly from the city of El Paso. That said engine was run from El Paso, Texas, to Toyah, Texas, on the 29th day of November, 1892, and that the engineer running said engine reported at Toyah that certain repairs were needed upon and about the same. That said engine was placed in the round-house of defendant at Toyah and some repairs were made upon the same at said place on the 30th day of November, 1892. That it was the duty of defendant to have had said engine inspected at Toyah, before its return trip to El Paso, Texas, but that before said engine left Toyah on said return trip, arriving in El Paso on the first day of December, 1892, it was not inspected, and through the failure of defendant to inspect the same said step hereinbefore mentioned was left in a bad, defective, unsafe and loose condition, so that the accident hereinbefore described
13 was caused, and the plaintiff was injured as hereinbefore mentioned.

That at the time said accident happened, defendant knew or ought to have known, and could have known by the exercise of reasonable diligence, that said step was in such a bad, loose and defective condition, and plaintiff did not know and was not chargeable with notice that said step was in such a condition.

Plaintiff states that at the time of said accident he was between 33 and 34 years of age; that prior to said accident he was a strong, able bodied and vigorous man, and his services were reasonably worth and he could have made the sum of $85 per month, and in consequence of such injuries he is now a cripple for life, and has been damaged by such injuries in the sum of twenty thousand dollars.

Plaintiff prays, the defendant having answered in this case, that upon final hearing he may have judgment for his damages and costs.

MILLARD PATTERSON,
C. N. BUCKLER,
Attorneys for Plaintiff.

Indorsed: No. 173. E. M. Patton *vs.* The Texas & Pacific Railway Company. Plaintiff's first amended original petition. Filed Ap'l 6th, 1898. D. H. Hart, clerk, by J. P. Hodgson, d'y.

Second Amended Original Answer of Defendant.

Filed April 8th, 1898.

In the United States Circuit Court, Western District of Texas, at El Paso, Texas, April Term, 1898.

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

Now comes the defendants and having obtained leave of the court files this its second amended original answer amending its answers

filed September 30th, 1893, and October 6th, 1893, and in answer to plaintiff's first amended original petition, filed April 6th, 1898, says:

14 1st. That the matters and things set forth in plaintiff's petition were not sufficient in law to entitle him to have and maintain his action against this defendant, and of this prays judgment of the court.

2nd. And for special exception defendant shows that plaintiff's petition does not allege that it was his duty to be on the engine where and when he alleges he was injured, or show any reason why he was probably on, or had a right to be on or about said engine at said time, and prays judgment.

3rd. For answer herein saving its demurrer defendant denies all and singular the allegations in plaintiff's petition contained and says that it is not guilty of the wrongs, injuries and trespasses therein complained of, and of this it puts itself upon the country.

4th. And for further special exception herein the defendant says that so much of said amended original petition, filed April 6th, 1898, as sets up that it was the duty of the defendant to have its engine inspected at Toyah, Texas, about the 30th day of November, 1892, and that it was not so inspected at said time and place, and the failure to make said inspection caused plaintiff's injuries, and which is an allegation made for the first time in said first amended original petition, filed April 6th, 1898, sets up a new and independent cause of action, which accrued more than one year prior to the filing of said amended petition, and is barred by limitation.

5th. And for further special exception herein defendant says that so much of said first amended original petition, filed April 6, 1898, as sets up that it was the duty of the defendant to have its engine inspected at Toyah, Texas, about the 30th day of November, 1892, and that it was not so inspected at said time and place, and the failure to make such inspection caused plaintiff's injuries, and which is an allegation made for the first time in said first amended original petition, filed April 6th, 1898, sets up a new and independent cause of action, which accrued more than two years prior to the filing of said amended petition, and is barred by limitation.

6th. And for further answer herein defendant admits that plaintiff was a fireman upon one of defendant's engines as stated in his said petition, and that at the time stated in the petition plaintiff's duty was to act as fireman of defendant's engine No. 90, which engine was engaged in hauling passenger trains over defendant's road from El Paso to Toyah, and from Toyah to El Paso. That on the day when plaintiff claims he was injured acting in his capacity as such fireman he was employed by defendant on said engine from

15 Toyah to the city of El Paso, pulling a passenger train and arrived in El Paso about 10.30 a. m. on said day, and a few minutes afterwards left said engine at defendant's depot in said city of El Paso. That it is true that it is part of plaintiff's duty as fireman to have his cans properly filled with oil and a portion of his engine wiped off and clean before said engine should proceed on its next trip from El Paso to Toyah, but that duty of

the plaintiff was not required nor expected to perform until after the engine had been inspected and repaired and placed in the round-house at El Paso. That it would have been plaintiff's duty to have gone out on said engine on the next day, December 2nd, at 2.30 p. m. and ample time and opportunity would have been given him after the said engine had been placed in the round-house and repaired to have performed his duty in relation to the same. That when the engine arrived at El Paso on said day as above stated, and plaintiff left the same at the depot and no longer had any business or connection with said engine until after the same was inspected and repaired. Said engine was taken charge of by the yardmen whose duty it was to take it into the yard and coal it, sand it, repair it and place it in the round-house where the proper servants of the company would clean all that portion of it which was not the duty of the plaintiff to clean and to leave the same in the round-house where plaintiff could clean such parts of it as he was required to clean, and arrange the cans, lubricators and other apparatus which he would need on his next outgoing trip.

That the plaintiff, without authority, or in the line of his duty, voluntarily got upon said engine while the same was in the charge of the yardmen and before the same had been repaired or placed in the round-house, and negligently attempted to get off of said engine while it was in motion, and thereby directly by his negligence contributed to the injuries that he received, wherefore, defendant prays that plaintiff should not recover and of this it puts itself upon the country.

7th. The plaintiff for further plea herein states that engine No. 90 was provided with suitable and proper apparatus to be used as steps to said engine and that defendant employed suitable and competent inspectors whose duty it was to inspect the same, and who did inspect it, and suitable and competent mechanics whose duty it was to repair said engine, and who did repair it when necessary, and that said engine was carefully inspected, but inspection failed to discover the defect, if any there was, in said step, and further that the plaintiff had full opportunity and knowledge of said machinery and apparatus and full opportunity to know whether or not said step was in safe condition, and that if the same was unsafe it became so without fault or negligence on the part of this defendant, and under the circumstances surrounding the plaintiff which gave him equal knowledge of such defect, if any, with the defendant, and that therefore plaintiff should not recover.

For further answer herein defendant says that if the plaintiff received injuries, set forth in his petition and such injuries were caused by any negligence on the part of the employés of defendant that such employés were fellow-servants with the plaintiff and that plaintiff is not entitled to recover of this defendant for such negligence and of this it puts itself upon the country.

8th. Defendant says that that portion of plaintiff's petition charging that defendant's engine was run from El Paso, Texas, to Toyah, Texas, on Nov. 29th, 1892, and arrived at Toyah, Texas,

about the 30th of November, 1892, and that it was the duty of defendant to have had said engine inspected at Toyah, Texas, before its return to El Paso, that it was not inspected, that the failure of defendant to inspect the same was the cause of the accident to plaintiff is a new and independent cause of action set up for the first time in plaintiff's first original petition, filed April 6th, 1898, and that the cause of action in said paragraph alleged accrued more than one year before the filing of said petition, and is barred by limitation.

9th. Defendant says that that portion of plaintiff's petition charging that defendant's engine was run from El Paso, Texas, to Toyah, Texas, on November 29th, 1892, and arrived at Toyah, Texas, about the 30th day of November, 1892, and that it was the duty of defendant to have had said engine inspected at Toyah, Texas, before its return to El Paso, that it was not inspected and that the failure of defendant to inspect the same was the cause of the accident to plaintiff is a new and independent cause of action set up for the first time in plaintiff's first original petition, filed April 6th, 1898, and that the cause of action in said paragraph alleged accrued more than two years before the filing of said petition, and is barred by limitation.

EDWARDS & EDWARDS,
Attorneys for Defendant.

Indorsed: No. 173. E. M. Patton *vs.* The Texas & Pacific Railway Company. Second amended original answer of defendant. Filed Ap'l 8, 1898. D. H. Hart, clerk, by J. P. Hodgson, deputy.

17 *Judgment.*

Entered April 8th, A. D. 1898.

In the Circuit Court of the United States for the Western District of Texas, at El Paso.

E. M. PATTON
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 173.

APRIL 8TH, A. D. 1898.

On this the 8th day of April, A. D. 1898, came on for trial this cause, and both parties announced ready for trial, and the defendant presented the demurrers contained in the second, third and fourth paragraphs of its second amended original answer filed April 8th, 1898, and the same having been considered by the court it is the opinion of the court that said exceptions are not well taken, and the same are hereby overruled, to which ruling of the court, the defendant then and there excepted.

Then came a jury of twelve good and lawful men, to wit: M. T. Chastain and eleven others, who having been duly sworn, and after hearing the evidence and argument of counsel, received the charge of the court and returned the following verdict:

"We, the jury, find for the defendant, The Texas & Pacific Railway Co.

M. T. CHASTAIN, *Foreman.*"

Which verdict is approved by the court.

It is therefore considered by the court that the plaintiff, E. M. Patton, take nothing by reason of his suit herein, and that the defendant, The Texas & Pacific Railway Company, go hence without day and recover of the plaintiff, E. M. Patton, all its costs in this behalf expended, for which let execution issue.

Motion for a New Trial.

Filed April 9th, 1898.

In the Circuit Court of the United States, at El Paso, April Term, 1898.

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 173.

Now comes the plaintiff by his attorneys and moves the
18 court to set aside the verdict of the jury, the judgment of the court and grant him a new trial in this cause, because:

First. The court erred in charging the jury to find a verdict in favor of the defendant.

MILLARD PATTERSON,
C. N. BUCKLER,
Attorneys for the Plaintiff, E. M. Patton.

Indorsed: No. 173. E. M. Patton *vs.* Texas & Pacific Railway Co. Motion for a new trial. Filed Ap'l 9th, 1898. D. H. Hart, clerk, by J. P. Hodgson, d'y.

Order Overruling Motion for New Trial.

Entered April 12th, 1898.

In the Circuit Court of the United States for the Western District of Texas, at El Paso.

E. M. PATTON
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 173.

APRIL 12TH, A. D. 1898.

On this the 12th day of April, 1898, came on to be heard the motion of plaintiff in the above styled and numbered cause for a new trial, and the court being fully advised, doth overrule the same.

Plaintiff's Bill of Exceptions.

Filed April 12th, 1898.

In the U. S. Cir. Ct., W. D. T., at El Paso, Texas.

E. M. PATTON
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 173.

Be it remembered that upon the trial of the above-entitled cause the following evidence was introduced, to wit:

Plaintiff, E. M. Patton, was in the employ of the defendant as a fireman at the time and some time before the accident men-
19 tioned in his petition; his regular work was as fireman of engine No. 90, which hauled a passenger train from the city of El Paso to Toyah, Texas, a distance of 196 miles, leaving El Paso about 2.30 p. m. and arriving at Toyah about 11.30 p. m. and remaining in Toyah the balance of the night and the next day until about 2 a. m., the morning of the second day, when the engine would return from Toyah to El Paso hauling a passenger train, arriving in El Paso about 10.30 a. m. on the same day, and again leaving El Paso for Toyah at 2.30 p. m. the next day; the engineer who ran said engine was named A. Stiner.

Second. It was the duty of the fireman of passenger engines in the employ of defendant, to keep the cab of the engine clean, and to clean all that portion of the engine above the running board—a board extending from one side of the engine to the center of the boiler, and to keep the oil cans and lubricators filled with oil, and to generally obey the orders of the engineer when the train was running.

Third. That the defendant had at El Paso a round-house and repairing shops and a machinist to inspect and repair the engines, and also had at Toyah a round-house and a machinist to inspect and repair its engines.

Fourth. When the defendant's passenger engines arrived at El Paso (including the engine upon which plaintiff worked) the engineer and fireman would get off, and leave the engine attached to the train at the depot, and the engine would be taken charge of by the yardmen and an employé called the "hostler" would detach the engine from the train and take the same down into the yard, to coal it, sand it, and do such other things as were necessary, except repairing it, and then place the same in the round-house where it would be cleaned by the servants other than the fireman in all its parts, beneath the running board, and inspected by the machinist and repaired, and that the fireman would have ample time after the engine was placed in the round-house, to clean out the cab, wipe off his part of the engine, fill his oil cans and lubricators, and then the engine would be taken from the round-house and attached to the train by the yardmen or hostler, where the fireman and engi-

neer would get on the train again to begin their trip, and plaintiff knew all this.

Fifth. There was no rule of the company that prohibited the fireman from getting on the engine for the purpose of filling his oil cans before it was placed in the round-house, nor was there any rule that specified a particular time when he should do this work. The only rule being that he was to have his engine in proper condition to go out when its turn came. He could not be called for duty until eight hours after he came in under the rule. That the fireman could select any time that was most convenient to him to clean the cab, fill the oil cans, etc., and that while the engine was hot and the oil warm it was more convenient and could be done in less time than to wait until the engine was cooled off.

Sixth. Passenger engine No. 90, on which the plaintiff was employed, has two steps on the right side; one of these steps is a loop fastened under the tender, and a person getting off the engine backwards would have this step on his left; the other step, which would be on his right side, was attached to the rear part of the engine, and it is this latter step the proof shows was loose. The gangway of the engine is where the tender and engine come together and there is an opening on each side of the engine; that these steps were used to get on and off the engine; the step which is claimed in this case to be defective is the step which is attached to the engine. This step consists of a shovel-shaped piece of iron standing directly out from the engine firmly fixed to a rod of iron about an inch in diameter and about eighteen inches long, which rod passes up through the iron casting at the rear of the engine, about six or eight inches thick; a shoulder to this rod fits underneath the casting, and the part passing through above has threads on the upper end upon which the nut is screwed firmly down on the casting, fastening the rod in the casting so that it will not move. This nut is about two inches square, and the thread on the nut extends five or six inches, thus making the rod extend above the nut, when the nut is properly screwed down, and covering this extension above the nut is a tubular piece of brass arranged for ornament which sets upon the nut and hides from view that portion of the nut immediately around the threads of the step bar. The step affixed to this bar is about twelve or fourteen inches above the track, and the one affixed to the tender is about six inches higher.

Seventh. On the 29th day of November, 1892, it was necessary to put a spring on the right side of the engine, and in order to do this, this step had to be removed in order to place a jack-screw under the rear of the engine, and in doing this the rod holding the step was taken out of the casting by unscrewing the nut described above, and the step was replaced on that morning at El Paso before the engine started on its run to Toyah. In replacing the step the plaintiff Patton himself, assisted the machinist of defendant at El Paso, Mr. Rossiter, in tightening up said nut, and on said day the engine left El Paso taking out a passenger train at the usual hour, 2.30 p. m. and made the run to Toyah. The machinist (Rossiter), and the plaintiff, testified that the nut was properly screwed on at El Paso

and would not have become loose in a trip from El Paso to Toyah and return.

Eighth. That at Toyah some repairs were made on the en-
21 gine. The plaintiff, with engine No. 90, and the train to which it was attached, left El Paso, Texas, for Toyah, on the 29th day of November, 1892, which was Saturday, and arrived in Toyah on the night of November 29, 1892, at 11.30 p. m. That when the train reached Toyah the engineer, Mr. Stiner, reported that repairs were necessary on his engine. That the report of the engineer in the book at Toyah, provided for that purpose, shows that the following repairs were to be made: "Change water; grind in blower; put gasket in front joint of blow-pipe; raise the pilot." That "change water" means to let the water out of the engine and put fresh water in. "Grind in blower" is to arrange the blower so that the smoke will pass out at the stack instead of coming out at the cab, and that "grind in blower" and "put gasket in front joint of blower pipe" are light and small jobs. That "to raise the pilot" required the engine to be jacked up and that gibs be put under the spring end of the engine truck; the engine truck is near the front end of the engine. The engine left Toyah at the usual hour of 2 a. m. on the morning of the first of December, 1892, and arrived at the usual hour at El Paso, 10.30 a. m. After they arrived in El Paso, E. M. Patton, the plaintiff, and the engineer, Mr. Stiner, both left the engine attached to the train at the depot, got off the engine on the right side, using the step mentioned in the evidence and went to their homes, and neither noticed anything wrong with the step. A short time after the engine arrived in El Paso, the "hostler" or man whose duty it is to take it, coal it, etc., and put it in the round-house, took charge of it, detached it from the train, ran it into the yard and set it on a transfer track, and left it there an hour or so, then took it to the coal cars and left it there for the coal-heavers to coal up, and it remained there an hour or more. The coal is placed in the tender back of the engine and piled up pretty high, and some of the pieces are a foot or eighteen inches long, and six or eight inches wide and very heavy, and one of them falling off the gangway might strike the step. When the hostler went later to get the engine from the coal yard the plaintiff was on the engine; the hostler ran the engine from where it was coaled, and was moving it to the proper position near the sand-house to have the fire cleaned out; it was something near an hour from the time the hostler started to leave the coal yards before he got to the sand-house, as he was detained by switches being closed. The plaintiff was on the engine during this time cleaning up and filling his cans and lubricators while the engine was nearing the place where the fire would be cleaned out and two fire-cleaners were on the engine also, one of them in the gangway and the other on the front of the engine; the engine was backing and the fire-cleaner on the engine was
22 in the act of showing the hostler by making a signal where to stop the engine and to clean out the fire. The engine at this time was moving very slowly; not more than three or four miles an hour, and the plaintiff had gotten off the gangway and

was standing on the steps, with his face to the engine and his left foot on the tender, and his right foot on the step which is heretofore described as attached by a rod to the rear of the engine, and the plaintiff desiring to get out of the way of the fire-cleaners, as the engine passed the sand-house, and for the purpose of stopping there and waiting until the fire was cleaned out, stepped off the engine in a careful and proper manner, that is, by detaching his left hand and foot, and stepping down with his left foot, which was in the direction the engine was backing; the pressure of his right foot turned the rod to which the step was attached in such a manner as to throw the step around close to the rear driving wheel of the engine, and plaintiff's right foot slipped off the step, so that his right foot fell immediately under the driving wheel, and the engine continuing to back the wheel passed over his right foot and crushed it so that amputation became necessary.

9th. Plaintiff knew that there were servants and employees of the defendant for the purpose of inspecting and repairing his engine and that the opportunity given to do this was when the engine was placed in the round-house at El Paso, and that at the time he fell and was injured the engine was not yet placed in the round-house where it would be inspected and repaired.

The cause of the turning of the step when plaintiff fell, was on account of the nut, heretofore described, on the top of the casting, not being taut, but it was loose, leaving the rod to which the step was attached so it could be easily turned.

It is the duty of the engineer who operates the engine to inspect and report all defects and repairs necessary on his engine in a book kept for that purpose at each place at the end of his run, in this instance in El Paso, and at Toyah, and on the day plaintiff was injured, the engineer entered the following report at El Paso a few minutes after they arrived, "Pilot-raising and wash out engine," that is, the pilot needed raising, and the engine was to be washed out, and he did not discover or report that the said step was loose, if it was loose at the time.

That the defendant had proper and competent inspectors to inspect and repair engines in the yards at El Paso and Toyah in addition to the inspections made by the engineers, and at the time plaintiff was hurt the yard inspectors and mechanics at El Paso had had no opportunity under the routine and customs as to handling,
coaling, sanding, cleaning, inspecting and repairing engines
23 as they arrived in the yards, to inspect or repair the engine
upon which he was injured at El Paso, and this plaintiff well knew.

Plaintiff's business in November and December, 1892, was fireman on a locomotive engine, and he had been engaged in said business about seven years, and was earning from eighty to eighty-four dollars a month. That he was thirty-four years of age and would probably live thirty-two years longer; he was in good health at the time of the accident, and had not missed a day's work for two or three years, and on account of losing his leg by being run over by defendant's engine he was not in a condition to follow his

business any more; and that he suffered great physical pain from the injury and was confined to his room for something like two months and was attended by a skillful physician and surgeon furnished by defendant.

10th. Plaintiff did not know that the said step on the engine was in a loose or defective condition at the time he stepped down on the same and was injured; that the manner in which the plaintiff got off the engine backward was a careful and prudent manner and that he alighted in a careful and prudent manner and in the usual manner in alighting from an engine, whether in motion or standing still, and that if said step had been in repair there was no danger in the manner in which plaintiff alighted from the engine.

Plaintiff testified that it was the custom of the fireman to go on their engines in the yards before they were put in the round-house, and do their work of cleaning such parts of the engine as it was their duty to clean, and cleaning out and filling the lubricators and filling the oil cans; that on being asked he could not mention the name of any other fireman employed on defendant's passenger engines who did this besides himself. He stated that his reason for doing this work on the engine at that time was that the weather was getting cool and he had to strain his oil, and he would set his cans out in the gangway near the engine so that the warmth would make it easier and quicker work to handle the oil properly, whereas, if he had waited until the engine was in the round-house the oil would have been somewhat chilled and more difficult to handle, and that for some time previous he had been going on the engine and doing this work while the engine was in the yard, and before it had been placed in the round-house.

Mr. Wheeler, who was superintendent of terminals and foreman of the shops in El Paso for defendant, the hostler Taylor, and the machinist Rossiter, employees in the defendant's yards and shops at El Paso, testified that plaintiff was the only fireman of a passenger engine that went upon his engine in the yard in El Paso to do his work before his engine had been placed in the
24 round-house, and that they had known him to do so three or four times before the accident.

All the witnesses, except A. C. Wheeler, superintendant and foreman of defendant, testified that the nut above described used to tighten the step would not work loose in making the trip from El Paso to Toyah and back by the ordinary jar and running of the engine; that it might come loose by the step having struck against something.

Wheeler testified that he was a competent machinist, having had an experience of twenty years with engines; that the nut might work loose on said trip but it was impossible to tell whether it would or not. Plaintiff testified that the step struck nothing in running that trip from El Paso to Toyah and return. It was proven that the nut and threads of the step-rod were in good condition, and had not worked loose since the accident to plaintiff.

11th. E. M. Patton, the plaintiff, testified for himself as follows:

Engine No. 90, on which I was employed as fireman, arrived at Toyah at 30 minutes after 11 on Saturday, November 29, 1892. We remained in the town of Toyah all day Sunday. Alexander Mitchell was the foreman of the round-house at Toyah and Mr. Young was the defendant's machinist there. I had had at that time about twelve years' experience as fireman and assistant foreman of round-house. I know what the duties of the foreman of the round-house at Toyah were. It was the duty of the foreman there to see that the work reported to be done by the engineer was done on the engines, and it was also his duty to report all material used in the round-house there and to keep the men's time, etc. As I have said, Mr. Young was the machinist there. His duty was to do the repairing of the engines that was reported there. It was his duty to do the work on the engine and see that it was done in a proper manner. I did not see Mr. Young, the machinist, around there on that day. I was around the round-house there the most of that day, Sunday. Jack-screws were placed around the engine while I was there There was a jack-screw placed on the right side close to this step. The pilot could not be raised without raising that corner of the engine where this step was fixed. I had my work to do on the engine at Toyah, and I remember getting off of it late in the afternoon of the Sunday mentioned, and when I got off of it on the right side after I did my work there I saw the jack-screws sitting about the engine. This was about the time I left the round-house and went to supper. It is the machinist's business to make the repairs on the engine called for by the engineer's report. I do not think that I used this step in getting off the engine on the way from Toyah back to El Paso. After we arrived at El Paso we got off on the right side. I don't remember whether I used the step.

25 The engine was standing still when we got off at El Paso. In stepping from the engine with the engine standing still a man might step right off. There was a loop step on the tender, and the step on the engine. A man might step off by putting his left foot on the loop and never touch the step at all. A great many times I will step on the ground while the engine is standing and never touch the step. I don't know of any occasion I would have for using this step at all on the way from Toyah to El Paso, nor any occasion we would have for getting off the engine on the right side coming from Toyah here. It was my custom to get off the engine once coming from Toyah to El Paso. That was at Sierra Blanca, where I got off for breakfast, and then I got off on the left side of the engine.

12th. A. Stiner, a witness in behalf of defendant, testified: I was the engineer in charge of engine No. 90 at the time plaintiff Patton was hurt, and was the engineer running that engine for some time before. Alexander Mitchell was a competent man to inspect engines. His employment at the time the accident happened was that of foreman at Toyah. The machinist at Toyah was a man named Young. There was no special inspector or repairer at Toyah at that time any more than the foreman and machinist. It

was the duty of anybody who was controlling the engine to see if anything was wrong. The machinist should do the work of grinding in the blower. The Chinamen did the work of putting in the gasket and changing water. The machinist should do the work of raising the pilot. It is the foreman's business to see that the machinist did it. When the engine went into Toyah, it was my duty as engineer to report defects in the engine and repairs to be made. It was my duty to examine the engine again before it left Toyah and see whether or not the repairs called for had been made, and there was no other inspection upon my part to be made at Toyah before we left there.

The witness Stiner was asked the following questions:

Q. "The attorney for the plaintiff has asked you the question whether it was not a part of the duty of the foreman or machinist not simply to do the repairs pointed out, but to inspect the engine itself generally and see whether it was in good condition?

A. Yes, sir; it was their duty to look around.

Q. If the engineer overlooks anything they might find it?

A. There is times an engineer overlooks something; they might find it.

Q. It is their business to look for it?

A. O, yes; it is their business to look.

Q. Do you know as a matter of fact whether the step was loose when the engine left Toyah?

A. No, sir.

26 Q. Did you examine the step at Toyah?

A. I don't know as I examined it; I got off and on.

Q. Did you examine the step to find out whether or not it was loose?

A. No, sir; I did not pull on it or anything like that.

Q. You don't know whether it was loose when it left Toyah or not?

A. It was not loose when I got on it. The step was not loose when I got on it.

Q. Did you examine it to see whether or not it was loose?

A. I examined it with my foot."

Down at Toyah I simply put my foot on the step and got up on the engine. I don't remember the run exactly now. I used the step at the San Martine tank, or at Prairie, and Van Horn; then again at Blanco and at Hancock, and whether I used it again between Hancock and El Paso I can't remember.

He also testified that the step was not loose when the engine left Toyah; that he examined it with his foot, and explained that he ascertained that it was not loose because he got up on the engine using this step several times as stated above between Toyah and El Paso, and while one might get down from the engine and not discover it, that in mounting the engine after oiling, he came from front of the engine and grabbed the hand-hold, put his left foot on this step and swung his body round to place the right foot in the loop on the tender.

13th. Alexander Mitchell being called as a witness for defendant testified as follows: On the 29th and 30th days of November, 1892, I was the round-house foreman of the Texas and Pacific Railway Company, at Toyah; the company had a machinist at Toyah at that time; he was not at the round-house on Sunday; his name was Charley Young. When he was not there it was my duty to do the work, to a certain extent—little jobs. I remember the engine No. 90 on which the plaintiff Patton was employed, coming in. The attorney for the defendant here called the witnesse's attention to the report made by the engineer when the engine reached Toyah on the night of November 29th, viz: "Change water, grind in blower, put gasket in front of blower pipe, and raise pilot also." The witness was asked the following questions:

"Q. What did you do to that engine?
A. I raised the engine in front without raising the pilot.
Q. I mean, did you make the other repairs?
A. No, sir; I did not.
Q. The small repairs?
A. No, sir; I did not.
Q. State what you did.
27 A. I put some clips or gibs under the springs to raise the pilot up.
Q. Did you complete the job?
A. I did.
Q. Did you do anything with the part of the engine near the engine step on the right side?
A. In order to do that I had the step off and jacks under it.
Q. On the right side of the engine?
A. Under that side to hold her up; I had to jack the front end up in order to do the work, and hold the back end up off the springs.
Q. That is what you did?
A. Yes.
Q. Did you have anything to do with the step?
A. I had it off.
Q. Did you put it back there?
A. Yes, sir.
Q. Did you put it back properly?
A. Yes, sir; I had men working with me to do it.
Q. Did you see it done?
A. I seen it being done; I went into the office and came out again.
Q. Did you examine the nut to see if it was put on right or not?
A. The nut was screwed up tight.
Q. The step was screwed up tight?
A. Yes, sir; I am sure it was screwed up tight; it made 200 miles.
Q. What was the condition of the engine—was that step in good condition when it left Toyah?
A. It left in the morning.
Q. When you got through with it?
A. When I left the round-house the engine was all right."

Cross-examination:

(Q.) "Did you put that jack-screw under the end of the engine?
A. I had it put under.
Q. You did?
A. Yes, sir.
Q. Did you take the step off?
A. I had to have it taken off.
Q. You saw it taken off?
A. Yes, sir.
28 Q. You could not take the step off without moving that nut at the top?
A. No, I would have to take that off to take the step off.
Q. Did you raise the pilot or not?
A. I raised the front end of the engine and of course that raised the pilot.
Q. That is the way you raised it?
A. That is the way I raised it.
Q. Were you there during the whole time the work was being done about the engine?
A. I think I was all the time that the work was being done on the engine in and about the office and about the round-house."

The witness Mitchell also testified that he had the step put back after taking out the jack-screw, and that the nut was screwed back properly, and that the nut was tight when the engine left the round-house at Toyah.

The witness Mitchell was here asked (by counsel for plaintiff) if he did not testify on the former trial of this case, in October, 1893, that the step was not moved for the purpose of putting the jack-screws under the end of the engine, and that the nut on the step was not moved while the engine was at Toyah on the trip mentioned, and that Mr. Young was a machinist at Toyah at that time. That it was Sunday the 30th day of November, 1892, and he, Mitchell, believing that he was competent to do so, undertook to make the repairs needed on the engine himself, and jacked the front part of the engine up for the purpose of raising the pilot, and finding that he could not accomplish the task of raising the pilot with the force at hand by himself, he did not do the work necessary to raise the pilot or cow-catcher. The witness replied that he had no recollection of so testifying.

He was then asked if he did not testify on the former trial of this case that the step mentioned in the evidence which turned with the plaintiff Patton was not moved at all while the engine was at Toyah on the 30th day of November, 1892, and if he did not testify that the nut by which this step was fastened was not moved at all on that trip. He said he had no recollection of so testifying. The witness was then asked the following questions:

"Q. Did you put the gasket in the pipe?
A. I did not.
Q. Did you grind the blower?

A. No, sir; I did not.
Q. Why did you put the jack-screw under that end of the engine?
A. I could not raise the engine and fix the engine without doing it.
29 Q. You could not do what you did about the pilot unless you raised the engine?
A. Unless I held the back part of the engine up.
Q. So, in doing what you did about the pilot, and in raising the pilot as you did raise it, you put these jack-screws under the end of the engine where the step was?
A. I had it done; I was there to see it was done.
Q. Were you a machinist then, Mr. Mitchell?
A. No, sir; I ain't no machinist; that is, I never learned the trade.
Q. That was a machinist's work you were trying to do, wasn't it?
A. Well, yes, it was a machinist's work, although I can do it."

The witness was here asked if he did not testify on the former trial in October, 1893, that to grind in the blower was a small job and that he did it; and that to put gasket in front joint of blower pipe was a very light job and he did it. He answered by saying that he had no recollection of so testifying.

14th. The plaintiff then introduced in evidence the stenographic report of the testimony of Alexander Mitchell, taken upon the trial of this cause at the October term, 1893, of this court, by George R. Harvey, official stenographer, it being admitted that said stenographic report is a true and correct statement of the testimony of said witness, and by the same it was proven that said witness, Alexander Mitchell, on the former trial of this cause, at the October term, 1893, testified as follows:

"That he told the Chinamen to get the jack-screws, and under his direction they placed two jack-screws, one on each side of the front of the engine, and that without any instructions from him they brought and put another jack-screw on the ground near the step. That he was out of the round-house five or ten minutes while the Chinamen were there, and that this jack-screw near the step was not placed under the engine in a position to elevate it, and that the step was not moved for the purpose of putting the jack-screws there, and that the nut on the step was not moved while the engine was at Toyah on that trip. That Mr. Young was the machinist at Toyah at that time, and that this was Sunday, the 30th day of November, 1892, and that he, Mitchell, believing that he was competent to do so undertook to make the repairs needed on the engine himself, and jacked the front part of the engine up for the purpose of raising the pilot, and finding that he could not accomplish the task of raising the pilot with the force at hand by himself, he did not do the work necessary to raise the pilot or cow-catcher. That to grind in the blower was a small job, and the witness
30 did this. That to put gasket in front joint of blower pipe was a very light job, and that this work was also done by the witness. That to raise the pilot required the witness to jack up

the engine and put gibs under the spring ends of the engine truck; the engine truck is near the front end of the engine; that the witness did not do this because it was a pretty big job, and he was doing the work by himself with the help of only two Chinamen; that the engine was all right and ran as well as if it had been done, except the pilot was a little low."

15th. The above and foregoing being all the facts, and all of the evidence introduced, counsel for defendant requested the court to instruct the jury to return a verdict for the defendant, "because there is not sufficient testimony to entitle the plaintiff to recover, and no evidence showing any negligence on the part of the defendant," which said instruction was given to the jury by the trial court, to which action of the court the plaintiff thereupon before the jury retired in open court excepted, (and now tenders his bill of exceptions) and insisted that the court should submit the cause to the jury upon the question of negligence raised by the pleadings and the evidence, and thereupon the jury returned the verdict which is copied in the judgment in this case, and thereupon the court rendered judgment against the plaintiff; and thereafter the plaintiff moved the court on the grounds stated in his motion for a new trial, contained in this record, to set aside said judgment, and the said motion was overruled, and the plaintiff now tenders this his bill of exceptions and asks that the same be allowed by the court, and filed as a part of the record in this cause, and the same is done accordingly.

Signed this 12th day of April, 1898.

T. S. MAXEY, *Judge.*

Indorsed: No. 173. In U. S. cir. ct., W. D. T., at El Paso, Texas. E. M. Patton *vs.* The Tex. & Pac. R'y Co. Plaintiff's bill of exceptions. Filed April 12, 1898. D. H. Hart, clerk.

31 *Assignment of Error.*

Filed April 13th, 1898.

In the United States Circuit Court, W. D. T., at El Paso.

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 173.

Assignment of error.

Now comes E. M. Patton, the plaintiff in the above-styled cause by his counsel, and says that in the record and proceedings in the above cause there was manifest error in this:

The trial court erred, to the prejudice of plaintiff, in instructing the jury as follows: "'To return a verdict for the defendant, because there is not sufficient testimony to entitle the plaintiff to recover, and no evidence showing any negligence on the part of defendant.' Said instruction was erroneous, as the evidence in the case tended

strongly to show that the injury of which the plaintiff complains was the direct result of negligence on the part of the defendant for which it is legally liable, and presented an issue of fact which should have been submitted to the jury. The evidence upon this trial was materially different from the evidence upon the former trial of the case, and the evidence tends strongly to show that the plaintiff's injuries were received through the negligence of defendant's employees at Toyah in leaving the step attached to the engine in a loose and unsafe condition. That said employees were charged with the duty imposed by law upon the defendant of inspecting the engine and keeping the various parts of and about the same in a reasonably safe and good condition, and that they negligently failed to perform such duty.

The evidence tends strongly to show that the step which turned with the plaintiff and caused the injuries he received through its being loose, was in a loose condition when the engine on which plaintiff was employed left Toyah, and that the engine was not inspected by defendant's machinist at Toyah, and that after repairs were made upon the engine at Toyah, the step was negligently left in a loose and unsafe condition.

Wherefore the plaintiff, E. M. Patton, prays that the judgment rendered against him by the United States circuit court for the western district of Texas, at El Paso, be reversed, and the cause remanded for a new trial.

MILLARD PATTERSON,
C. N. BUCKLER,
Attorneys for the Plaintiff, E. M. Patton.

Indorsed: No. 173. E. M. Patton *vs.* The Tex. & Pac. R'y Co.
Assignments of error. Filed April 13, 1898. D. H. Hart, clerk.

32 *Writ of Error.*

Allowed and filed April 13th, 1898.

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between E. M. Patton, plaintiff, and The Texas and Pacific Railway Company, defendant, a manifest error hath happened, to the great damage of the said E. M. Patton as by h[illegible] complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the

fifth circuit, together with this writ, so that you have the same at New Orleans, Louisiana, within thirty days from the date hereof, in the said United States circuit court of appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of April, in the year of our Lord, one thousand eight hundred and ninety-eight.

[SEAL.]

D. H. HART,
Clerk of the United States Circuit Court,
Western District of Texas.

Allowed this, the 13th day of April, 1898.

T. S. MAXEY,
United States Judge.

(Indorsement:) No. 173. E. M. Patton, plaintiff in error, *vs.* The Texas & Pacific Railway Company, defendant in error. Writ of error. Filed April 13, 1898. D. H. Hart, clerk.

33 *Writ of Error Bond.*

Filed April 13th, 1898.

Know all men by these presents that we, E. M. Patton, as principal, and Fred Schaefer, A. K. Albers, as sureties are held and firmly bound unto The Texas & Pacific Railway Company in the full and just sum of five hundred dollars, to be paid to the said Texas & Pacific Railway Company, its certain attorney, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of April, in the year of our Lord, one thousand eight hundred and ninety-eight.

Whereas, lately at a term of the circuit court of the United States for the western district of Texas, at El Paso, in a suit depending in said court, between E. M. Patton, plaintiff, and The Texas & Pacific Railway Company, defendant, numbered 173 on the docket of said court, a judgment was rendered against the said E. M. Patton on the — day of April, 1898, that the said E. M. Patton take nothing by his suit and the defendant, The Texas & Pacific Railway Company, go hence without a day and recover of the plaintiff, E. M. Patton, all costs by it expended, and the said E. M. Patton having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Texas & Pacific Railway Company and its attorneys of record, citing and admonishing it to be and appear before the United States circuit court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said E. M. Patton shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of:

E. M. PATTON, [SEAL.]
By MILLARD PATTERSON,
His Agent and Att'y.
FRED SCHAEFER. [SEAL.]
A. K. ALBERS. [SEAL.]

Approved this the 13th day of April, 1898.

T. S. MAXEY,
United States Judge.

34 Indorsed: No. 173. E. M. Patton, plaintiff in error, *vs.* The Texas & Pacific Railway Co., defendant in error. Bond. Filed April 13, 1898. D. H. Hart, clerk.

Citation in Error.

Filed April 13th, 1898.

THE UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

The President of the United States to The Texas & Pacific Railway Company, defendant in error, Greeting:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals, for the fifth circuit at New Orleans, Louisiana, within thirty days from the date hereof, pursuant to a writ of error sued out and filed in the clerk's office of the circuit court of the United States for the western district of Texas at El Paso, in the cause wherein E. M. Patton is plaintiff in error, and The Texas & Pacific Railway Company is defendant in error, to show cause, if any there be, why the judgment rendered against the said E. M. Patton, plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 13th day o April, in the y ar of our Lord one thousand eight hundred and ninety-eight.

Signed this, the 13th day of April, 1898.

[SEAL.]

T. S. MAXEY,
United States Judge.

Attest: D. H. HART, *Clerk.*

Indorsed: No. 173. E. M. Patton, pl'ff in error, *vs.* The Texas & Pacific Railway Co., def't in error. Citation. We acknowledge service of the foregoing citation this the 13th day of April, 1898, at

El Paso, Texas. Edwards & Edwards, att'ys for The Texas & Pacific Railway Company, defendant in error. Filed April 13th, 1898. D. H. Hart, clerk.

35 *Clerk's Certificate.*

The United States of America, Western District of Texas, at El Paso.

I, D. H. Hart, clerk of the circuit court of the United States for the western district of Texas, do hereby certify, that the foregoing (38) thirty-eight pages contain a true and correct copy of the proceedings had in cause No. 173, entitled E. M. Patton *vs.* Texas & Pacific Railway Company, as the same appears on file and of record in this office. And I further certify that the original writ of error is included in said transcript.

Witness my hand and the seal of said court, at office in the city of El Paso, Texas, this the 20th day of April, A. D. 1898.

[SEAL.] D. H. HART,
Clerk of said Circuit Court.

36 United States Circuit Court of Appeals, Fifth Circuit,
November Term, 1898.

JANUARY 9TH, 1899.

(Extract from Minutes.)

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 724.

This cause was regularly called this day and submitted to the court, after argument, by Mr. C. N. Buckler, for plaintiff in error, and by Mr. T. J. Freeman, for defendant in error.

November Term, 1898.

MARCH 21ST, 1899.

(Extract from Minutes.)

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 724.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of Texas, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed.

It is further adjudged that the plaintiff in error, E. M. Patton, and the sureties on the writ of error bond herein, Fred Schaefer and A. K. Albers, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

37 *Assignments of Error.*

United States Circuit Court of Appeals, Fifth Circuit.

E. M. PATTON, Plaintiff in Error,
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant in Error. } No. 724.

Now, on this the — of July, 1899, comes E. M. Patton, by his attorneys, and says that in the record and proceedings in the above-entitled action in the United States circuit court of appeals for the fifth circuit there is manifest error in this, to wit:

First.

Said United States circuit court of appeals for the fifth circuit erred in refusing to sustain the first assignment of error urged by the plaintiff in error and in refusing to hold that the trial court erred, to the prejudice of plaintiff, in instructing the jury as follows: "To return a verdict for the defendant because there is not sufficient testimony to entitle the plaintiff to recover and no evidence showing any negligence on the part of defendant." Said instruction was erroneous, as the evidence in the case tended strongly to show that the injury of which the plaintiff complains was the direct result of negligence on the part of defendant, for which it is legally liable, and presented an issue of fact which should have been submitted to the jury. The evidence upon this trial was materially different from the evidence upon the former trial of this case, and the evidence tends strongly to show that the plaintiff's injuries were received through the negligence of defendant's employees at Toyah in leaving the step attached to the engine in a loose and unsafe condition; that said employees were charged with the duty imposed by law upon the defendant of inspecting the engine and keeping the various parts of and about the same in a reason-
38 ably safe and good condition, and that they negligently failed to perform such duty.

Second.

The evidence upon the trial tended strongly to show that the step which turned with the plaintiff and caused the injuries which he received through its being loose was in a loose condition when the engine on which the plaintiff was employed left Toyah, and that the engine was not inspected by the defendant's machinist at Toyah, and after repairs were made upon the engine at Toyah the step was negligently left in a loose and unsafe condition.

Wherefore the plaintiff in error, E. M. Patton, prays that the judgment of said circuit court of appeals for the fifth circuit be reversed and that said cause be remanded to the United States circuit court

for the western district of Texas for trial, and prays for all such orders in the premises as may be just and proper.

MILLARD PATTERSON,
C. N. BUCKLER,
Attorneys for E. M. Patton, Plaintiff in Error.

Endorsed: Filed July 26, 1899. J. M. McKee, clerk.

Petition for Writ of Error.

United States Circuit Court of Appeals, Fifth Circuit.

E. M. PATTON, Plaintiff in Error,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY, Defendant in Error.

To the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, or any associate justice of the Supreme Court of the United States:

Now comes E. M. Patton, by his attorneys, and complains
39 that in the record of proceedings and also in the rendition of the judgment of the United States circuit court of appeals for the fifth circuit in the above styled and numbered cause, on the — day of March, 1899, affirming the judgment of the United States circuit court for the western district of Texas in said cause, manifest error hath intervened, to the great damage of E. M. Patton.

Your petitioner would state that the circuit court of the United States for the western district of Texas, where this suit was originally tried, obtained jurisdiction, and jurisdiction depended upon the fact that The Texas and Pacific Railway Company, the defendants therein, was a corporation created by an act of Congress; that the matter in controversy herein exceeds five thousand dollars, besides costs.

Wherefore he prays for allowance of a writ of error, to the end that this cause and the said judgment may be carried to the Supreme Court of the United States for review, and prays for supersedeas of said judgment, and such other process as may cause the same to be corrected in said Supreme Court.

MILLARD PATTERSON,
C. N. BUCKLER,
Attorneys for E. M. Patton.

Writ of error allowed and bond fixed at one thousand dollars this 13th day of July, 1899.

E. D. WHITE,
Associate Justice Supreme Court of the United States.

Endorsed: Filed July 26, 1899. J. M. McKee, clerk.

Writ of Error Bond.

United States Circuit Court of Appeals, Fifth Circuit.

40 E. M. PATTON, Plaintiff in Error,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY, Defendant in Error. } No. 724.

Know all men by these presents that we, E. M. Patton, as principle, and Horace B. Stevens and Fred Shaefer, as sureties, of the city of El Paso, State of Texas, *and* held and firmly bound unto The Texas and Pacific Railway Company in the full and just sum of one thousand dollars, to be paid to the said Texas and Pacific Railway Company, its certain attorneys, successors, or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, by these presents.

Sealed with our seals and dated this — day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at a regular term of the United States court in and for the western district of Texas, sitting at El Paso, at the April term, 1898, in a suit pending in said court between E. M. Patton, plaintiff, and The Texas and Pacific Railway Company, defendant, a judgment was rendered against the plaintiff that he take nothing by his suit, and that said defendant go hence without day and recover its costs of plaintiff, etc.;

And whereas the said E. M. Patton duly obtained a writ of error from the United States circuit court of appeals for the fifth circuit, which said court, on the — day of March, 1899, rendered a judgment affirming the said judgment of the United States circuit court in all particulars;

And whereas the said E. M. Patton has sued out a writ of error from the Supreme Court of the United States and filed a copy thereof in the aforesaid suit, and also a citation, directed to the said Texas and Pacific Railway Company, citing and admonishing it to be and appear at said Supreme Court, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said E. M. Patton shall prosecute his writ of error and answer
41 all damages and costs if he fail to make his plea good, than the above obligation to be void; otherwise to remain in full force and virtue.

E. M. PATTON.
HORACE B. STEVENS.
FRED SHAEFER.

The foregoing bond approved.
E. D. WHITE,
Associate Justice Supreme Court United States.

THE STATE OF TEXAS, }
County of El Paso. }

Before me, the undersigned authority, on this day personally appeared Horace B. Stevens and Fred Shaefer, who each deposes and says that he resides in the city of El Paso, Texas, and that, all his debts and liabilities being paid, he is well worth the sum of one thousand dollars in property situated in the city of El Paso, Texas, subject and liable to seizure and for the satisfaction of any judgment that may be rendered against him.

HORACE B. STEVENS.
FRED SHAEFER.

Sworn to and subscribed before me this the 1st day of July, 1899.

MILLARD PATTERSON,
Notary Public, El Paso County, Texas.

STATE OF TEXAS, }
El Paso County, Western District Texas. }

I hereby certify that Horace B. Stevens and Fred Shaefer, sureties on the foregoing bond, are each well worth the sum of one thousand dollars over and above all debts, liabilities, and exemptions, and said bond is a good and sufficient bond.

Witness my official signature and seal, at El Paso, Texas, this 1st day of July, 1899.

D. H. HART,
Clerk U. S. Circuit Court, Western Dist. Texas, at El Paso, Texas,
By J. P. HODGSON, *Deputy.*

Endorsed: Filed July 26, 1899. J. M. McKee, clerk.

42 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1898.

(Filed —— —, ——.)

E. M. PATTON, Plaintiff in Error,
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant in Error. } No. 724.

Error to the United States circuit court for the western district of Texas.

Before McCormick, circuit judge, and Boarman and Parlange, district judges.

Statement of the Case.

This cause has once previously been before this court on writ of error. It was then very fully stated. 23 U. S. App., 319, 61 F. R. 259. The only differences which are claimed to exist between the

evidence in the cause on the former writ of error and the evidence as now brought up on the present writ of error are to be found, on the one hand, in the testimony of A. Stiner, a witness in
43 behalf of the defendant below, which is now claimed by the defendant in error to be more strongly in its favor than on the first trial, and, on the other hand, in the testimony of Alexander Mitchell, a witness for the defendant below, who is now claimed by the plaintiff in error to have testified on the second trial in a different manner from that in which he had testified on the first. The testimony of Stiner, delivered on the second trial and found in the record of this cause, is as follows:

"A. Stiner, a witness in behalf of defendant, testified:

"I was the engineer in charge of engine No. 90 at the time plaintiff Patton was hurt, and was the engineer running that engine for some time before. Alexander Mitchell was a competent man to inspect engines. His employment at the time the accident happened was that of foreman at Toyah. The machinist at Toyah was a man named Young. There was no special inspector or repairer at Toyah at that time, any more than the foreman and machinist. It was the duty of anybody who was controlling the engine to see if anything was wrong. The machinist should do the work of grinding in the blower. The Chinamen did the work of putting in the gasket and changing water. The machinist should do the work of raising the pilot. It is the foreman's business to see that the machinist did it. When the engine went into Toyah, it was my duty as engineer to report defects in the engine and repairs to be made. It was my duty to examine the engine again before it left Toyah and see whether or not the repairs called for had been made. There was no other inspection upon my part to be made at Toyah before we left there."

The witness was asked the following questions:

"Q. The attorney for the plaintiff has asked you the question whether it was not a part of the duty of the foreman or machinist not simply to do the repairs pointed out, but to inspect the engine itself generally and see whether it was in good condition?

"A. Yes, sir; it was their duty to look around.

"Q. If the engineer overlooks anything, they might find it?

"A. There is times an engineer overlooks something. They might find it.

"Q. It is their business to look for it?

"A. O, yes; it is their business to look.

"Q. Do you know, as a matter of fact, whether the step was loose when the engine left Toyah?

"A. No, sir.

"Q. Did you examine the step at Toyah?

"A. I don't know as I examined it. I got off and on.

"Q. Did you examine the step to find out whether or not it was loose?

"A. No, sir; I did not pull on it or anything like that.

44 "Q. You don't know whether it was loose when it left Toyah or not?

"A. It was not loose when I got on it. The step was not loose when I got on it.

"Q. Did you examine it to see whether or not it was loose?

"A. I examined it with my foot. Down at Toyah I simply put my foot on the step and got up on the engine. I don't remember the run exactly now. I used the step at the San Martine tank or at Prairie and Van Horn, then again at Blanco and at Hancock, and whether I used it again between Hancock and El Paso I can't remember."

He also testified that the step was not loose when the engine left Toyah; that he examined it with his foot; and explained that he ascertained that it was not loose because he got up on the engine, using this step several times, as stated above, between Toyah and El Paso, and while one might get down from the engine and not discover it, that in mounting the engine after oiling he came from front of the engine and grabbed the hand-hold, put his left foot on this step, and swung his body round to place the right foot in the loop on the tender."

The testimony of Alexander Mitchell, a witness in behalf of the defendant below, was, on the second trial, as follows:

"On the 29th and 30th days of November, 1892, I was the round-house foreman of the Texas & Pacific Railway Company at Toyah. The company had a machinist at Toyah at that time. He was not at the round-house on Sunday. His name was Charley Young. When he was not there it was my duty to do the work, to a certain extent—little jobs. I remember the engine No. 90, on which the plaintiff Patton was employed, coming in."

The attorney for the defendant here called the witness' attention to the report made by the engineer when the engine reached Toyah on the night of November 29th, viz: "Change water, grind in blower, put gasket in front of blower pipe, and raise pilot, also." The witness was asked the following questions:

"Q. What did you do to that engine?

"A. I raised the engine in front without raising the pilot.

"Q. I mean, did you make the other repairs?

"A. No, sir; I did not.

"Q. The small repairs?

"A. No, sir; I did not.

"Q. State what you did.

"A. I put some clips or gibs under the springs to raise the pilot up.

"Q. Did you complete the job?

"A. I did.

"Q. Did you do anything with the part of the engine near the engine step on the right side?

"A. In order to do that I had the step off and jacks under it.

"Q. On the right side of the engine?

"A. Under that side to hold her up; I had to jack the front end

up in order to do the work, and hold the back end up off the springs.

"Q. That is what you did?

"A. Yes.

45 "Q. Did you have anything to do with the step?

"A. I had it off.

"Q. Did you put it back there?

"A. Yes, sir.

"Q. Did you put it back properly?

"A. Yes, sir; I had men working with me to do it.

"Q. Did you see it done?

"A. I seen it being done. I went into the office and came out again.

"Q. Did you examine the nut to see if it was put on right or not?

"A. The nut was screwed up tight.

"Q. The step was screwed up tight?

"A. Yes, sir; I am sure it was screwed up tight. It made two hundred miles.

"Q. What was the condition of the engine? Was that step in good condition when it left Toyah?

"A. It left in the morning.

"Q. When you got through with it?

"A. When I left the round-house the engine was all right.

"Cross-examination:

"Q. Did you put that jack-screw under the end of the engine?

"A. I had it put under.

"Q. You did?

"A. Yes, sir.

"Q. Did you take the step off?

"A. I had to have it taken off.

"Q. You saw it taken off?

"A. Yes, sir.

"Q. You could not take the step off without moving that nut at the top?

"A. No; I would have to take that off to take the step off.

"Q. Did you raise the pilot or not?

"A. I raised the front end of the engine and of course that raised the pilot.

"Q. That is the way you raised it?

"A. That is the way I raised it.

"Q. Were you there during the whole time the work was being done, about the engine?

"A. I think I was all the time that the work was being done on the engine in and about the office and about the round-house."

The witness Mitchell also testified that he had the step put back after taking out the jack screw, and that the nut was screwed back properly, and that the nut was tight when the engine left the round-house at Toyah.

The witness Mitchell was here asked (by counsel for plaintiff) if he did not testify on the former trial of this case, in October, 1893,

that the step was not moved for the purpose of putting the jack-screws under the end of the engine, and that the nut on the step was not moved while the engine was at Toyah on the trip mentioned, and that Mr. Young was a machinist at Toyah at that time; that it was Sunday, the 30th day of November, 1892, and he, Mitchell, believing that he was competent to do so, undertook
46 to make the repairs needed on the engine himself, and jacked the front part of the engine up for the purpose of raising the pilot, and finding that he could not accomplish the task of raising the pilot with the force at hand by himself, he did not do the work necessary to raise the pilot or cow-catcher. The witness replied that he had no recollection of so testifying.

He was then asked if he did not testify on the former trial of this case that the step mentioned in the evidence which turned with the plaintiff Patton was not moved at all while the engine was at Toyah on the 30th day of November, 1892, and if he did not testify that the nut by which this step was fastened was not moved at all on that trip. He said he had no recollection of so testifying.

The witness was then asked the following questions:

"Q. Did you put the gasket in the pipe?

"A. I did not.

"Q. Did you grind the blower?

"A. No, sir; I did not.

"Q. Why did you put the jack-screw under that end of the engine?

"A. I could not raise the engine and fix the engine without doing it.

"Q. You could not do what you did about the pilot unless you raised the engine?

"A. Unless I held the back part of the engine up.

"Q. So, in doing what you did about the pilot and in raising the pilot as you did raise it, you put these jack-screws under the end of the engine where the step was?

"A. I had it done; I was there to see it was done.

"Q. Were you a machinist then, Mr. Mitchell?

"A. No, sir; I ain't no machinist—that is, I never learned the trade.

"Q. That was a machinist's work you were trying to do, wasn't it?

"A. Well, yes, it was a machinist's work, although I can do it."

The witness was here asked if he did not testify on the former trial, in October, 1893, that to grind in the blower was a small job, and that he did it, and that to put gasket in front joint of blower pipe was a very light job, and he did it. He answered by saying that he had no recollection of so testifying.

The plaintiff then introduced in evidence the stenographic report of the testimony of Alexander Mitchell, taken upon the first trial of this cause, which was as follows:

"That he told the Chinamen to get the jack-screws, and under his direction they placed two jack-screws, one on each side of the front of the engine, and that without any instructions from him

they brought and put another jack-screw on the ground near the step; that he was out of the round-house five or ten minutes while the Chinamen were there, and that this jack-screw near the step was not placed under the engine in a position to elevate it, and that the step was not moved for the purpose of putting the jack-screws there, and that the nut on the step was not moved while the engine was at Toyah on that trip; that Mr. Young was the machinist at Toyah at that time, and that this was Sunday, the 30th day of November, 1892, and that he, Mitchell, believing that he was competent to do so, undertook to make the repairs needed on the engine himself, and jacked the front part of the engine up for the purpose of raising the pilot, and, finding that he could not accomplish the task of raising the pilot with the force at hand by himself,
47 he did not do the work necessary to raise the pilot or cow-catcher; that to grind in the blower was a small job, and the witness did this; that to put gasket in front of blower pipe was a very light job, and that this work was also done by the witness; that to raise the pilot required the witness to jack up the engine and put gibs under the spring ends of the engine truck; the engine truck is near the front end of the engine; that the witness did not do this because it was a pretty big job, and he was doing the work by himself, with the help of only two Chinamen; that the engine was all right and ran as well as if it had been done, except the pilot was a little low."

After the close of the evidence heard upon the second trial of the cause, the trial judge instructed the jury to return a verdict for the defendant below "because there is not sufficient testimony to entitle the plaintiff to recover, and no evidence showing any negligence on the part of the defendant;" to which instruction the plaintiff below duly excepted, insisting that the court should submit the cause to the jury upon the question of negligence raised by the pleadings and the evidence. The jury thereupon returned their verdict in favor of the defendant, The Texas and Pacific Railway Company.

E. M. Patton, the plaintiff below, sued out the present writ of error. The assignment of error complains that the court directed a verdict as stated above. He contends that the evidence on the second trial was materially different from the evidence upon the former trial, and that the evidence tends strongly to show that the plaintiff's injuries were received through the negligence of the defendant's employés at Toyah, in leaving the step attached to the engine in a loose and unsafe condition, and that said employés were charged with the duty imposed by law upon the defendant railway company of inspecting the engine and keeping the various parts of the same in a reasonably safe and good condition, and that they negligently failed to perform such duty; that the evi-
48 dence tends strongly to show that the step which turned with the plaintiff and caused the injuries he received was in a loose condition when the engine left Toyah, and that the engine was not inspected by defendant's machinist at Toyah, and that after repairs were made upon the engine at Toyah the step was negligently left in a loose and unsafe condition.

PARLANGE, district judge (after stating the facts), delivered the opinion of the court:

When this cause was before this court during the November term of 1893 this court said, upon a careful examination of the entire evidence: "It seems to us that to state the case is sufficient to show that the defendant had not been negligent and could not justly be held liable. The exception to the charge of the court and to the refusal of the requested charge having served to bring up, in the bill of exceptions, a full statement of all the evidence given on the trial, it appears from the face of the record that there was no evidence to sustain the judgment of the circuit court. It is thus manifestly erroneous and must be reversed."

The cause was remanded to the lower court for further proceedings in conformity with the opinion of this court. At the close of the second trial below the judge directed a verdict in favor of The Texas & Pacific Railway Company, defendant below. The plaintiff below duly excepted to that action of the trial judge, and he has brought up all the evidence in the bill of exceptions.

49 It is clear that the opinion of this court on the former writ of error is the law of this cause and is still controlling therein, unless the evidence on the second trial was materially different from the evidence on the first trial.

This court, on the former writ of error, found substantially that by uncontradicted evidence the following facts, among others, were established, viz:

On Nov. 29, 1892, it became necessary to remove and replace the step in question. This was done by the engineer and the plaintiff himself. The nut which fastened the step was made tight. It was properly screwed on and would not have become loose in a trip from El Paso to Toyah and return. The step was not removed at Toyah. The engine left Toyah at 2 a. m. on the morning of Dec. 1st, 1892. During the return trip to El Paso the plaintiff below and the engineer got off the engine several times, on the right side, while it was standing, and neither of them noticed any disturbance of the step. When they reached El Paso, on the return trip, at about 10.30 a. m., on Dec. 1st, 1892, they left the engine attached to the train at the depot, both of them getting off the engine on the right side and using the very step in question. Neither of them noticed that anything was wrong with the step. They went to their homes. A few hours afterwards the plaintiff returned to the engine. It was then in charge of the employés of the railway company for the purpose of being coaled, sanded, and cleaned by others than the fireman, and it was thereafter to be inspected by the machinist.

50 The purpose of the plaintiff in then returning to the engine was to wipe off parts of the engine and to fill the oil cans and lubricators. He was not required *to*, but permitted, if he chose, to do that work at the time he did it. It was more convenient to do it while the engine and the oil were still hot. He would have had ample time, after the engine had been placed in the roundhouse, to do his work. While, as already stated, the engine was in

the hands of other employés for the purposes stated, the plaintiff undertook to do and proceeded with his work of cleaning parts of the engine and filling the cans and lubricators. The engine was in motion, running at the rate of about three or four miles an hour. It was about to stop, when the plaintiff, in order to get out of the way of other employés, and also for the purpose of getting off at the place where the engine was about to stop, stepped down backwards off the engine, using the step in question. The step turned, causing his right foot to fall under the driving wheel of the engine and to be crushed by it.

The only change in the evidence upon which the plaintiff in error relies for relief from the former decision of this court in this cause, and in fact the only difference in the evidence as heard on the first and on the second trials—except the evidence of the engineer Stiner, which is claimed by the defendant in error to be much stronger in its favor now than on the previous occasion—is that Mitchell, the round-house foreman at Toyah, testified on the first trial that he did not remove the step at Toyah, but that all repairs called for by the engineer were made, and, in a general way, that the engine on leaving Toyah was in good condition, whereas he testified on the second trial that he did remove the step at Toyah, but that he replaced it or caused it to be replaced properly, and that he is sure that the nut "was screwed up tight."

51 In our opinion, this change in the testimony of Mitchell cannot affect what was adjudicated by this court on the former writ of error. This court then found that there was no evidence of negligence on the part of the defendant railway company for which it could be made liable. Under the views then expressed by this court, what evidence of such negligence is there now to be found in the record? If either one of Mitchell's statements be true, the plaintiff in error can derive no benefit from it; for whether Mitchell did not take off the step at Toyah, or took it off and replaced it properly, the case must go against the plaintiff in error, under the views heretofore expressed by this court. If Mitchell, because of his contradictory statements, is unworthy of belief, his evidence should be disregarded and eliminated. But the fact that Mitchell made two contradictory statements, both of which are favorable to the railway company, cannot be held to be equivalent to or to supply the place of proof of negligence on the part of the railway company directly the reverse of either of the contradictory statements. A bare suspicion that Mitchell did not properly fasten the step at Toyah, arising merely from the fact that he made two contradictory statements, would not have warranted the jury in finding against the railway company.

The uncontradicted facts remain established that the plaintiff himself assisted in fastening the step at El Paso; that this was sufficient to secure the nut for the round trip to Toyah and back; that the step was used and was not loose while going and returning; that after the arrival at El Paso on the return trip the step was used by the plaintiff himself and was only found loose a few hours

afterwards, while the engine was under the control of other
52 employés of the railway, whose duty it was to coal it, sand it, and do such other necessary things as might be required, except repairing, and when the engine was to be taken immediately thereafter to the round-house, where it was to be inspected, and where it would, if necessary, have been repaired.

On such facts and under the views of this court expressed on the first writ of error, the plaintiff below could not recover.

The judgment of the lower court is affirmed.

53 *Certificate.*

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing fifty-three pages, numbered from a to fifty-two, inclusive, contain a true copy of the record and all proceedings had, including the opinion of the court, in the case of E. M. Patton, plaintiff in error, *vs.* The Texas & Pacific Railway Company, defendant in error, No. 724, as fully and completely as the same remains of record and on file in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 31st day of July, 1899.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

54 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between E. M. Patton, plaintiff in error, and The Texas and Pacific Railway Company, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 724. Writ of error. Filed July 26, 1899. J. M. McKee, cl'k.

55 UNITED STATES OF AMERICA, *ss*:

To the Texas and Pacific Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the fifth circuit, wherein E. M. Patton is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this 13th day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

Service of the foregoing citation in error is admitted and accepted this the 29th day of July, 1899.

T. J. FREEMAN,
Att'y and Counsel for the Texas and Pacific Railway Company, Defendant in Error.

[Endorsed:] Citation in error.
Endorsed on cover: File No., 17,495. U. S. circuit court of appeals, 5th circuit. Term No., 381. E. M. Patton, plaintiff in error, *vs.* The Texas & Pacific Railway Company. Filed August 22, 1899.